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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1297

EMERSON ELECTRIC CO., U. S. ELECTRICAL MOTORS, INC., BEN HARDWICK, TRAVIS CHEATHAM and JERRY PALMER,
Petitioners,

v.

J. R. FULTON, HUBERT LOVERN, PAT GREEN, R. B. ROBERTSON, ALONZO DAVIS, LESTER LONG, ALTON COLE, OLYN COWARD and CLIFTON McDONALD,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

To THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Emerson Electric Co., U. S. Electrical Motors, Inc., Ben Hardwick, Travis Cheatham, and Jerry Palmer, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered December 22, 1969, which reversed the judgment entered in favor of peti-

tioners and against respondents by the United States District Court for the Southern District of Mississippi (R. 57).[1]

Opinions Below

The opinion of the district court (R. 55-56) is unreported. The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals (R. 66, App., infra, p. A-6) was entered on December 22, 1969, and this petition was filed within ninety days of that date.

Jurisdiction is conferred upon this Court by 28 U. S. C., § 1254(1).

Question Presented for Review

Does a United States district court have jurisdiction, under 28 U. S. C., § 1343, of a civil claim filed by certain employees and a union against an employer and its supervisory personnel alleging unlawful interference with an attempted union organizational campaign and deprivation of the rights of collective bargaining, or is such jurisdiction pre-empted by the National Labor Relations Act?[2]

Statutes Involved

Title 28 U. S. C., §1343 and the pertinent sections of the National Labor Relations Act, 29 U. S. C., §§ 152(9),

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[1] References are to pages of Record certified to this Court by the Clerk of the United States Court of Appeals for the Fifth Circuit.

[2] If certiorari should be granted, petitioners reserve the right to brief and argue the question as to whether respondents' Complaint states a claim upon which relief can be granted under 42 U. S. C., §§ 1983, 1985 or 1986.

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157, 158(a)(1), and of the "Civil Rights" Acts, 42 U. S. C., §§ 1983, 1985(3) and 1986, are set out in the Appendix hereto, infra, at pp. A-8 through A-11.

Statement of the Case

This suit was filed by respondents, employees of petitioner Emerson Electric Co. (hereinafter "Emerson"), and by a union, the International Union of Electrical Workers (hereinafter "IUE"), against petitioners and others, alleging that petitioners had violated respondents' "civil rights" as a result of an alleged conspiracy to deprive respondents of their right to organize and unionize Emerson's plant in Philadelphia, Mississippi. The jurisdiction of the district court was invoked under 28 U. S. C., § 1343.

The petitioners herein are (1) Emerson, a Missouri corporation, the employer; (2) U. S. Electrical Motors, Inc., now a division of Emerson; (3) Ben Hardwick, superintendent of Emerson's Philadelphia plant; (4) Travis Cheatham, Emerson's general foreman; and (5) Jerry Palmer, personnel manager of the plant. There are numerous other defendants, including county and municipal officials, who are not parties to this petition.

Inasmuch as the district court granted petitioners' motion to dismiss, the facts before this Court are the well-pleaded averments of the Complaint (R. 1-14). For the purposes of this petition, the critical allegations are that since 1963 Emerson has operated a plant in Philadelphia, Mississippi, which was financed by an industrial revenue bond issue approved by the Agricultural and Industrial Board of the State of Mississippi and the voters of Neshoba County (R. 3-4). The IUE has been engaged in an effort to organize and unionize the employees of Emerson's Philadelphia plant and to establish the IUE as the

bargaining agent for such employees (R. 5). The union assigned one Fred Prater to meet with Emerson's employees to encourage them to further the cause of the union and to distribute union literature (R. 5).

Respondents allege that petitioners have joined among themselves and with others, under color of state law, to deprive respondents of their rights, privileges and immunities secured by the First and Fourteenth Amendments, their freedom of speech, press, choice, vote and assembly, and their right to receive and disseminate information concerning federal legislation, to wit: the National Labor Relations Act (R. 6). Respondents further allege that on February 1, 1967, petitioner Cheatham, Emerson's foreman, instructed certain employees of Emerson to "start trouble with plaintiff Prater and those assisting him, in order to prevent the distribution of handbills favorable to IUE" at the exit gate of Emerson's plant (R. 6).

It is further alleged that on March 1, 1967, on the orders of petitioners Palmer and Cheatham, certain of Emerson's employees were required to sign a pledge to resist the union (R. 7). Thereafter, shortly before midnight of March 1, certain of Emerson's employees are charged with having physically attacked the union organizers and sympathizers near the gate of the Philadelphia plant to prevent them from distributing IUE handbills (R. 7).

Respondents seek damages under 42 U. S. C., §§ 1983, 1985(3) and 1986 for their personal injuries and request an injunction to prevent petitioners from depriving respondents of the benefits of unionization and collective bargaining at Emerson's Philadelphia plant.

The district court dismissed the Complaint on two grounds: (1) that the Complaint failed to state a claim upon which relief can be granted because the actions

complained of were not taken "under color of state law"; and (2) that the alleged claims are arguably within the exclusive jurisdiction of the National Labor Relations Board (R. 57). The Court of Appeals for the Fifth Circuit reversed on both grounds, holding that the Complaint contained a sufficient allegation of action "under color of state law" and that respondents' claims were not pre-empted by the National Labor Relations Act (See pp. A-1 through A-5, infra).

Reasons for Granting the Writ

1. The Court of Appeals has decided a federal question in a way which is in conflict with the decision of this Court in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959).

2. This case presents an important question in the administration of the National Labor Relations Act. The decision of the Court of Appeals, if allowed to stand, would sanction wholesale circumvention of the National Labor Relations Board, which Congress has expressly endowed with exclusive jurisdiction of labor disputes to prevent fragmentation and inconsistency in the administration of the national labor policy.

ARGUMENT

I. The Court of Appeals Has Decided a Federal Question in a Way Which Is in Conflict With the Decision of This Court in San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959).

This case, as between these petitioners and respondents, is a "labor dispute," as that term is defined in 29 U. S. C., § 152(9). The plaintiffs in the district court were the IUE, one of its organizers, and Emerson employees who were evidently sympathetic to the union.[3] The petitioners here are the employer, Emerson, one of its divisions, its plant superintendent, general foreman, and plant personnel manager.

The Complaint specifically alleges that Emerson is an "employer" whose business affects commerce within the meaning of the National Labor Relations Act (R. 4-5) and that the IUE is a "labor organization" as contemplated by the Act (R. 1-2). The activities of the respondents which they are seeking to insulate from petitioners' interference are detailed in paragraph 6 of Count I of the Complaint (R. 5):

> "6. IUE is presently, and at all times material hereto, engaged in an organizational effort among the appropriate employees of the Company, so that said employees may have an opportunity freely, without coercion and duress, to select a collective bargaining representative and engage in collective bargaining and other activities for their mutual aid and protection as is their right under the LMRA."

It is further alleged in paragraph 7 that plaintiff Prater, an international representative of IUE, had been assigned

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[3] The union and its organizer, Prater, withdrew from the case prior to its submission to the Court of Appeals (R. 63). This, of course, does not change the nature of the dispute.

to distribute informational material relative to union organizing and that his mission was to encourage the employees of Emerson to designate IUE as their collective bargaining representative.

Paragraph 8 of the Complaint asserts that, as an integral part of the organizational campaign by the IUE, plaintiff Prater participated with other employees in the distribution of union handbills to Emerson employees on a public thoroughfare at the exit of the company's premises in Philadelphia, Mississippi.

The respondents are charged with engaging in conduct aimed at preventing the distribution of handbills favorable to the IUE, and it is alleged that as a result, respondents "are being deprived of the benefits of unionization and collective bargaining" at the Emerson plant (R. 8).

Section 7 of the National Labor Relations Act (29 U. S. C., § 157) provides in part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *."

Section 8(a)(1) (29 U. S. C., § 158(a)(1)) makes it an unfair labor practice for the employer to interfere with, restrain or coerce employees in the exercise of their Section 7 rights.

Therefore, there can be no doubt that the endeavors of respondents constitute protected activities under Section 7 of the NLRA and that the acts attributed to petitioners, if true, would constitute an unfair labor practice under § 8(a)(1).

As between the parties to this petition, then, this is a classic employer-employee dispute, the resolution of which Congress has entrusted solely to the competence of the National Labor Relations Board. Respondents have acknowledged the Board's jurisdiction over this dispute by filing an unfair labor practice charge with the Board (R. 48-53). The New Orleans office of the NLRB refused to issue a complaint against the employer, and this refusal was upheld on appeal by the office of general counsel of the Board (See Appendix, infra, p. A-12). Respondents are now asking the federal courts to re-examine the exact same factual situation and to reach a conclusion in conflict with that of the Board. This is precisely the type of abuse which Congress and the preemption doctrine have sought to prevent.

In 1959, this Court in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, stated:

> "... When an activity is arguably subject to Section 7 or Section 8 of the Act, the States *as well as the Federal courts* must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (Emphasis supplied.)

The Court in the *Garmon* case was confronted with a question of state court jurisdiction in a labor dispute, and it held that the state court there was without jurisdiction to adjudicate the issues involved in that controversy. In so doing, the Court ruled unequivocally, as stated in the above quotation, that federal courts must also defer to the exclusive expertise of the Labor Board. See *Amazon Cotton Mills Co. v. Textile Workers Union*, 167 F. 2d 183 (4th Cir. 1948); *Portland Web Pressmen's Union v. Oregonian Publishing Company*, 286 F. 2d 4 (9th Cir. 1960), *cert. denied* 366 U. S. 912 (1961). In the

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Amazon case, the Fourth Circuit made the following oft-quoted observations, l. c. 186:

> "It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that act was 'to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining'; that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise in the unfair labor practices which it defined." (Citations omitted.)

The reasoning of this Court in arriving at its decision in the *Garmon* case is directly applicable here. The Court emphasized that when it is clear from the pleadings or "may be fairly assumed" that the cause of action pleaded purports to seek remedial regulation over matters protected by Section 7 of the Act, or an unfair labor practice under Section 8, it was the compelling Congressional direction in the enactment of the National Labor Relations Act to repose the responsibility for the administration of such labor matters and the determination of appropriate remedial action to the exclusive and primary competence of the Labor Board. This is true "regardless of the mode adopted" because, as the Court said, "to allow the states to control conduct which is the subject of national regulation would create potential frustration of national purposes" (359 U. S. at 244).

The rationale of pre-emption is premised on the expertise of the Labor Board and the desirability of avoiding incompatible or conflicting adjudications. In *Garner v. Teamsters Union*, 346 U. S. 485, 490-91 (1953), this

Court acknowledged the necessity of centralized administration of federal labor law:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Therefore, this Court has uniformly and consistently held that neither state nor federal courts have jurisdiction over suits directly involving activity which is even *arguably* subject to Section 7 or 8 of the NLRA. There can be no doubt that the allegations of the Complaint in the case at bar charge activities *squarely* within such sections.

The union, Mr. Prater and a Mr. McNeil were, according to the Complaint, attempting to organize the employees at Emerson's plant, and the activities alleged to have been committed by the petitioners were charged as having been designed to restrain and coerce Emerson's employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 51). Respondents seek to escape the effect of *Garmon* by giving the acts complained of different names and by joining persons other than these petitioners as parties defendant. Instead of charging, as they did in their unfair labor practice complaint, that the petitioners "restrained and coerced [the] employees in the exercise of

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their rights guaranteed in Section 7 of the Act" (R. 51), respondents allege that the petitioners deprived them of their "civil rights." But the pre-emption doctrine, as enunciated by this Court in the *Garmon* case and in the series of subsequent cases dealing with similar questions, does not recognize any such exception as that which the Court of Appeals has here sanctioned.

Congress has carved out only two legislative exceptions to exclusive NLRB jurisdiction in Sections 301 and 303 of the Act (29 U. S. C., §§ 185, 187), which provide for private suits to remedy breaches of labor contracts, secondary boycotts and jurisdictional disputes. See, e. g., *Smith v. Evening News Association,* 371 U. S. 195 (1962). This Court has also recognized certain limited departures from pre-emption where the interest of the NLRB in a given dispute is merely peripheral and the *local* or *state* concern is direct, paramount and overriding, as in cases of violence, *Automobile Workers v. Russell,* 356 U. S. 634 (1958), and libel, *Linn v. Plant Guard Workers,* 383 U. S. 53 (1966). These cases merely recognize the *state's* interest in maintaining peace and order. The other exception countenanced by this Court allows civil litigation where the union has breached its duty of fairly and equally representing all union members. *Vaca v. Sipes,* 386 U. S. 171 (1967). None of the recognized exceptions to the *Garmon* doctrine is even remotely applicable here.

Each of the cases recognizing such exceptions nonetheless expressly reaffirms the *Garmon* pre-emption doctrine and clearly mandates that avoidance of the NLRB as a forum must be discouraged and sharply circumscribed. Typical of these reconfirmations of *Garmon* is the statement of the Court in *Linn v. Plant Guard Workers,* 383 U. S. at 59:

> "However, in framing the pre-emption question before us we need look primarily to *San Diego Building*

Trades Council v. Garmon, 359 U. S. 236 (1959). There in most meticulous language this Court spelled out the 'extent to which the variegated laws of the several States are displaced by a single, uniform, national rule . . .' At 241. The Court emphasized that it was for the Board and the Congress to define the 'precise and closely limited demarcations that can be adequately fashioned by legislation and administration,' while '[o]ur task is confined to dealing with classes of situations.' At 242. In this respect, the Court concluded that *the States need not yield jurisdiction 'where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.'*" (Emphasis supplied.)

It should be very carefully noted that the interest of the Labor Board in the present case is not peripheral but direct, and that there is no "local" interest involved here. Rather, respondents are seeking to assert a parallel *federal* right by the mere expedient of characterizing the acts complained of as a "violation of civil rights" rather than an "unfair labor practice."

The Court of Appeals below attempted to justify its departure from *Garmon* by branding this case with a *Linn* or *Vaca* label. This reasoning is unpersuasive. There is simply no basis for comparison between *Linn* and *Vaca* on the one hand and this case on the other. There is no precedent, implied or express, for circumventing the NLRB merely by attaching a "civil rights" tag to a labor dispute. Nor can jurisdiction of an unfair labor practice charge be conferred on a federal district court *as against*

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a defendant employer by the simple device of joining that employer with other co-defendants over whom the NLRB has no jurisdiction.

II. This Case Presents an Important Question in the Administration of the National Labor Relations Act.

In addition to the remedy properly available to respondents against petitioners under the exclusive jurisdiction of the Labor Board, they seek to create an additional remedy against these petitioners enforceable in the federal courts, parallel to and contemporaneous with that given to them by the NLRA. This they attempt to do under the more popular banner of "civil rights" rather than the more prosaic one of "unfair labor practice"; and, as indicated, they seek this novel remedy not in lieu of but in addition to the remedies provided by the Act.

Although the actions complained of, if proven, would undoubtedly constitute an unfair labor practice in violation of Section 8 of the Act, and the union and the employees involved would be entitled to the remedies provided for them by the Act,[4] and although respondents have actually asserted their rights under the Act, they seek—merely by using different terminology—simultaneously to devise and assert a separate, concurrent and supplemental remedy, for the same alleged offense, which will be enforceable in the federal courts.

The Court of Appeals acknowledged (p. A-5, infra) that "this case is one presenting delicate and far-reaching questions." Indeed, the judgment of that Court, if allowed to stand, would authorize and encourage unions and employees to file complaints with the Labor Board against

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[4] The Court of Appeals recognized that the NLRB could afford adequate relief against these petitioners. See Appendix, infra, p. A-5.

any alleged unfair practices on the part of employers and at the same time to sue in the federal courts for damages and injunctions. And if the Labor Board should hold, as it has done here, that the evidence does not support the allegation of an unfair labor practice, the employees could then seek recourse in the courts and request a determination that the acts which did not constitute unfair labor practices somehow or other violated their "civil rights." Even in those cases where the Labor Board might find that unfair labor practices have been committed and grant the relief prayed for, the complainants might also seek to obtain separate, supplemental and additional relief in the courts.

It is difficult to conceive of a device more likely to produce direct conflict and inconsistencies between the decisions of the federal courts and the national labor policy as determined and enunciated by the National Labor Relations Board, the very result which Congress has disapproved and which the pre-emption doctrine is designed to avoid. We emphasize once again this Court's observations in *Garner v. Teamster's Union,* 346 U. S. 485, 490-91:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

It should be noted that the reconsignment of this case to the NLRB as against these petitioners would not cause the respondents to be deprived of any legal remedies to which they might be entitled. The question of union representation would be adjudicated by the legislatively designated tribunal—the Labor Board; and any damages suffered by any of the respondents can be redressed in a conventional tort action, which could, under appropriate circumstances, eventuate in an injunction.

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We deem it unnecessary at this stage to discuss the question as to whether this suit may properly proceed as a "civil rights" action against the defendant county and municipal officials, emphasizing only that the inclusion of the employer and its supervisory personnel as co-defendants is proscribed by the national labor policy and the *Garmon* doctrine. Regardless of how the claim against other defendants is denominated, the claim against *these petitioners* is that of an unfair labor practice.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX

APPENDIX A

Opinion

In the
United States Court of Appeals
For the Fifth Circuit

No. 27122

J. R. Fulton, et al.,
Plaintiffs-Appellants,

versus

Emerson Electric Co., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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(December 22, 1969)

Before Brown, Chief Judge, and Jones and Carswell, Circuit Judges

Per Curiam: Here employees of Emerson Electric's Philadelphia, Mississippi plant seek reversal of the District Court's judgment dismissing their claims under the Civil Rights Acts—42 U. S. C. A., §§ 1983, 1985 and 1986. In the District Court plaintiffs sought relief against Emerson Electric, various public officials of the City of Philadelphia

and Neshoba County, Mississippi, and a group of private citizens of Neshoba County, including employees of Emerson Electric and the editor of the *Neshoba Democrat*, a local newspaper. The relief sought was for alleged interference with plaintiffs' rights of freedom of speech and assembly and statutory Section 7 rights to organize labor unions. 29 U. S. C. A., § 157.

As is too often the case when claims are dismissed on the pleadings,[1] the District Court's dismissal was premature. The District Court held that the pleadings did not state a claim because they did not allege the "state action" necessary under the Civil Rights Acts. Much of this seems traceable to the impression gained by the trial court from arguments successfully pressed on it by the defendants, and renewed with like vigor here, that this is a case seeking damages and other relief for a physical assault physically committed against plaintiffs by fellow employees of Emerson in which none of the enumerated defendants had any immediate participation. In addition, the District Court held that relief could not be granted because the claims were "within the exclusive jurisdiction of the National Labor Relations Board."

When the pleadings are given a *Conley*[2] reading it is, however, apparent that sufficient "state action" has been alleged. The gravamen of the complaint was that one or more or all of the public officials, private citizens, and the company took concerted action to deprive plaintiffs of an opportunity to attempt to organize a union in the com-

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[1] See Pred v. Board of Public Inst., 5 Cir., 1969, ... F. 2d ..., ..., n. 1 [No. 26576, Sept. 9, 1969].

[2] Conley v. Gibson, 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. See also Pred v. Board of Public Inst., 5 Cir., 1969, ... F. 2d ..., ..., n. 11 [No. 26576, Sept. 9, 1969 Slip op. p. 18]; Gomez v. Florida State Employment Service, 5 Cir., 1969; ... F. 2d ..., ... [No. 26719, Oct. 9, 1969 Slip op. pp. 19-20].

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pany's plant.[3] It was, of course, specifically alleged that (i) the union spokesmen were beaten when they attempted to distribute literature, and that (ii) the beating was a product of the alleged concerted action, and that (iii) the public officials acquiesced[4] in these assaults.[5] But it was

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[3] The directness with which these fundamental, constitutionnal claims were asserted is illustrated by paragraphs 9 and 10 of the complaint:

> "9. To frustrate the efforts of Plaintiffs the Defendants have joined together among themselves with officers and agents of the Company, and with persons whose identities are not now known to the Plaintiffs, intentionally to discriminate against the Plaintiffs and to deprive them, and to cause them to be deprived—under color of statutes, ordinances, laws, customs and usages of the town of Philadelphia, County of Neshoba and State of Mississippi—of their rights, privileges and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States—including but not limited to, their right to freedom of speech, press, choice, vote and assembly secured by said Amendments, and to the equal protection of the laws within the State of Mississippi, and their privileges and immunities under said Amendments, as United States citizens, to disseminate and receive information concerning federal legislation and to assemble peaceably for the discussion of federal legislation.
>
> "10. Acting jointly, as aforesaid, the Defendants and others whose identities are not now known to Plaintiffs—acting under color of Mississippi law and authority—have taken action, or caused or instigated action to be taken—likewise under color of Mississippi law and authority—depriving Plaintiffs of their constitutional rights referred to in subparagraph 9 above."

[4] At least at this stage it cannot be ruled out that the proof might permit acquiescence in such assaults to supply the requisite state action. See Burton v. Wilmington Parking Authority, 1961, 365 U. S. 715, 725, 81 S. Ct. 856, ..., 6 L. Ed. 2d 45, 52, where the Court says:

> "But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be * * *. By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."

[5] In addition to the concerted action alleged by plaintiffs, they also attempt to demonstrate state action by allegations that the

much more than a case in which plaintiffs were seeking to impose liabilities on all or some of the defendants for an assault which, on a total reading of the complaint, is but a manifestation of the concerted action asserted.

Concerted action of private parties and state officials has consistently been held to be sufficient allegation of "state action" for 42 U. S. C. A., § 1983 and § 1985, *U. S. v. Price*, 1966, 383 U. S. 787, 793, 86 S. Ct. 1152, ..., 16 L. Ed. 2d 267, 272; *Gomez v. Florida State Employment Service*, 5 Cir., 1969, ... F. 2d ...., ... [No. 26719, Oct. 9, 1969, slip op. pp. 19-20]; *Baldwin v. Morgan*, 5 Cir., 1961, 287 F. 2d 750; *Boman v. Birmingham Transit Co.*, 5 Cir., 1960, 280 F. 2d 531.

The District Court was also mistaken in applying the doctrine of the pre-emption of labor matters by the NLRB. It is true that "as a general rule, neither state nor federal Courts have jurisdiction over suits directly involving 'activity [which] is arguably subject to § 7 of § 8 of the Act.'" *San Diego Building Trades Council v. Garmon*, 1959, 359 U. S. 236, 245, 79 S. Ct. 773, ..., 3 L. Ed. 2d 775, 783. But like all "general rules" the doctrine of the NLRB's pre-emption is subject to exceptions. See e. g., *Linn v. Plant Guard Workers*, 1966, 383 U. S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582; *Vaca v. Sipes*, 1967, 386 U. S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842. Thus the pre-emption of federal and state Court jurisdiction over a particular class of cases depends "upon the nature of the particular interest being asserted and the effect upon the administra-

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Emerson Electric Philadelphia plant was financed under the Mississippi industrial revenue bond program administered by that State's "A & I Board". It is, however, unnecessary for us to here pass on whether such state financial participation is sufficient "state action" under the Civil Rights Acts to state a claim for which relief can be granted when other actions not directly connected with the financing are alleged. But see Burton v. Wilmington Parking Authority, 1961, 365 U. S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45.

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tion of national labor policies of concurrent judicial and administrative remedies." *Vaca v. Sipes, supra,* 386 U. S. at 180, 87 S. Ct., at ...., 17 L. Ed. 2d at 852.

The particular interests involved here may include those employee-employer relationships that the NLRB was established to deal with. But many more interests are also involved. The dispute is not just between an employee and his employer; it is also between citizens and those who control the political institutions of a whole community.[6] The relationship is not just employee-employer, but individual and the state through participation of state officers in actions by private persons. The NLRB was not intended to deal with such problems. Indeed, it could afford no relief as against any party but the employer. The problems alleged here are of constitutional proportions —an area where Courts always have a role. *Vaca v. Sipes, supra.* See also, *Automobile Workers v. Russell,* 1957, 356 U. S. 634, 78 S. Ct. 923, 2 L. Ed. 2d 1030.

Bearing upon both dismissal on the pleadings and preemption it deserves emphasis that this case is one presenting delicate and far reaching questions. Questions that demand full-bodied records for disposition. *Public Affairs Associates v. Rickover,* 1962, 369 U. S. 111, 82 S. Ct. 5. Thus, at least on the record that now comes to us, we cannot say that plaintiffs could not prove facts that would entitle them to relief. We therefore return this case to the District Court, but we do so without even a whisper as to what the ultimate result should be.

Reversed and Remanded.

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[6] This community has been the locale for other civil rights controversies. See U. S. v. Price, 1966, 383 U. S. 787, 86 S. Ct. 1152, 16 L. Ed. 2d 267; Posey v. United States, 5 Cir., 1969, ... F. 2d ... [No. 25654, July 17, 1969].

APPENDIX B

Judgment

United States Court of Appeals
For the Fifth Circuit

October Term, 1969

No. 27122

D. C. Docket No. CA 1419

J. R. Fulton, et al.,
Plaintiffs-Appellants,

versus

Emerson Electric Co., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before Brown, Chief Judge, Jones and Carswell, Circuit Judges

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by Counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

December 22, 1969

APPENDIX C

Statutes

28 U. S. C., § 1343 "Civil Rights and Elective Franchise":

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

29 U. S. C., § 152 "Definitions":

* * * * * * * *

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation

of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

29 U. S. C., § 157 "Right of Employees as to Organization, Collective Bargaining, etc.":

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title."

29 U. S. C., § 158 "Unfair Labor Practices":

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . ."

42 U. S. C., § 1983 "Civil Action for Deprivation of Rights":

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U. S. C., § 1985 "Conspiracy to Interfere With Civil Rights—Preventing Officer From Performing Duties":

* * * * * * * *

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators."

42 U. S. C., § 1986 "Same; Action for Neglect to Prevent":

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of

the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action. . . ."

APPENDIX D

National Labor Relations Board
Office of the General Counsel
Washington, D. C. 20570

March 6, 1969

Re: U. S. Electric Motors, Inc.
Div. of Emerson Electric Co., et al.

Case No. 15-CA-3153

Mr. Melvin Warshaw
Assistant General Counsel
International Union of Electrical, Radio
and Machine Workers, AFL-CIO
1126 Sixteenth Street, N. W.
Washington, D. C. 20036

Dear Mr. Warshaw:

Your appeal from the refusal to issue complaint in the captioned case, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

The appeal is denied. Under all the circumstances, it could not be established that the Company had initiated, supported, condoned or ratified the assault on Union organizers. The evidence disclosed that the Company had promptly and publicly deplored and disavowed the acts of violence and warned against recurrences of such conduct, and that, following the Company's action Union literature was distributed peacefully and without inci-

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dent. Accordingly, and absent any other issue on appeal, further proceedings herein were unwarranted.

Very truly yours

Arnold Ordman
General Counsel

By: Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: Director, Region 15